CLIFFORD CHANCE

THE POST-BREXIT PATCHWORK: EU market access rules for UK firms

– THOUGHT LEADERSHIP

NOVEMBER 2020

THE POST-BREXIT PATCHWORK: EU MARKET ACCESS RULES FOR UK FIRMS

On 31 December 2020, at the end of the Brexit transition period, UK firms will lose the passporting rights on which they currently rely to provide financial services in other EU jurisdictions. Instead, UK firms will need to consider the rules of each EU Member State to determine whether, and the extent to which, they will be able to continue providing services to clients in that jurisdiction.

This step change in UK firms' market access rights arises as a result of the UK leaving the EU single market. While the existing EU financial services regulatory framework includes numerous third-country regimes based on equivalence, none come close to replicating single market membership. Instead, UK firms will need to navigate a patchwork of national licensing regimes and face restrictions on cross-border business and many other impediments compared with the market access rights that an EU firm would have.

BREXIT AND THE END OF THE TRANSITION PERIOD

The UK left the EU on 31 January 2020. Under the terms of the Withdrawal Agreement[1] agreed between the EU and the UK, the UK immediately entered a transition period during which EU law relevant to financial services continues to apply in both the UK and the EU as if the UK were still an EU Member State. For example, passporting and other market access rights between the UK and the EU continue to apply during the transition period.

The transition period was intended to provide time for the EU and the UK to negotiate the terms of their future relationship. However, at the time of writing, those negotiations remain ongoing, with little time left to conclude a trade agreement before the end of the transition period. Even if a free trade agreement is concluded before the end of 2020, neither the UK nor the EU is seeking a special agreement on market access for financial services that would come close to replicating single market membership.

Instead, the end of the transition period will involve a step change in market access between the UK and the EU for financial services, including loss of passporting rights. While the existing EU financial services regulatory framework includes numerous third-country regimes based on equivalence, most of these regimes do not relate directly to market access rights. Of those third-country regimes that do provide for some degree of market access, the most significant is the new third-country regime under MiFID2 and MiFIR that will apply from 21 June 2021. However, the European Commission has indicated[2] that it does not intend to make an equivalence determination with respect to the UK for the purposes of this regime in the short or medium term, as the relevant EU legal framework is not fully in place. This means that UK firms will need to navigate a patchwork of national licensing regimes, as there is currently no harmonised approach to cross-border market access for financial services across the EU, with each Member State taking a different approach.

1. The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2019:384I:FULL&from=EN

2. See the Communication from the Commission to the EU Parliament, Council, ECON Committee and Committee of the Regions on readiness at the end of the transition period, dated 9 July 2020 and available at https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/com_2020_324_2_communication_from_commission_to_inst_en_0.pdf

In the lead-up to a potential no-deal Brexit in late 2018 and early 2019, a number of EU Member States put forward temporary measures that aimed to mitigate some of the cliff-edge impacts that a no-deal Brexit would have entailed. However, various of these measures were contingent on a no-deal Brexit occurring and so they fell away with the conclusion of the Withdrawal Agreement. Nevertheless, the position of financial services firms at the end of the Brexit transition period is expected to resemble closely the no-deal Brexit scenario, for the reasons outlined above. Even so, it remains unclear, even at this very late stage, whether some Member States may introduce similar transitional measures to mitigate some of the cliff-edge impacts that are expected to arise at the end of the transition period; for example, to allow UK firms to continue servicing existing contracts with EU clients.

Other Member States introduced changes to their existing third-country regimes which were not contingent on a no-deal Brexit occurring and so they will also be relevant to UK firms at the end of the transition period. For example, certain Member States amended their laws to extend settlement finality protections to transfer orders in non-EU systems.

This briefing sets out the current (or expected) position for UK firms seeking to continue financial services business after the end of the transition period with clients in Belgium, the Czech Republic, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Romania and Spain.

BELGIUM

Belgium allows non-EEA credit institutions and investment firms to provide investment services and activities on a cross-border basis to certain eligible clients under the so-called "light touch" regime. Under this regime, firms that are authorised to provide the relevant services in their home state may notify the Financial Services and Markets Authority (FSMA) of their intention to provide services in Belgium. Although the law does not require the FSMA to authorise firms formally when they have applied for the regime, the FSMA publishes a list of firms which have notified of their intention to operate in Belgium on the basis of the "light touch" regime, and the FSMA may oppose any application if, according to the FSMA, the conditions for the "light touch" regime are not satisfied.

The conditions for the "light touch" regime are as follows:

(a) the firm applying for the regime must be authorised to provide the services it wishes to offer in Belgium in its home state, and it must effectively provide those services in its home state; and

(b) the home state of the applicant must offer similar market access to Belgian firms.

Firms that have applied for the "light touch" regime will be able to provide MiFID investment services and MiFID investment activities relating to financial instruments to per se professional clients, eligible counterparties and certain expatriates in Belgium. No other services can be rendered under this regime (such as payment services, deposit-taking services, intermediation services, etc.), unless a separate licence or authorisation (if available) is obtained for these other services. Those firms will also be required to comply with the Belgian rules of general interest, in particular rules of conduct, when providing services to Belgian clients.

In April 2019, Belgium adopted a no-deal Brexit law which confirms the "light touch" regime, but allows the government to impose additional obligations on third-country firms that applied for the regime – in particular, the government may require those firms to comply with MiFID/MiFIR-type reporting obligations. So far, the government has not adopted those measures, and instead a draft law amending the Brexit law of April 2019 was approved by the government and is expected to be tabled in Parliament shortly.

CZECH REPUBLIC

Before the Withdrawal Agreement was concluded between the EU and the UK, the Czech Republic had introduced Act No. 74/2019 Coll., on certain relationships relating to the exit of the United Kingdom and Northern Ireland from the European Union (Czech Brexit

Act). However, the Czech Brexit Act is not relevant because it is limited in time until the end of 2020 and, during the transition period, the Withdrawal Agreement applied instead. There is currently no indication that the Czech Brexit Act will be prolonged after the transition period.

The Czech Republic has not introduced specific legislation for regulatory permissions in respect of financial services covered by the EU passport regime in the case of a no-deal Brexit as per the end of the transition period. The provision of financial services by financial services providers to Czech clients will therefore need to be reviewed against the background of general financial services legislation and guidance given by the Czech National Bank (the Czech financial and capital markets regulatory authority).

This means that the provision of financial services provided under the EU passport regime will be subject to the traditional licensing regime after the end of the transition period. This does not place financial services providers in a position which is different from that of any other third-country firm, i.e. any other country outside the EEA. The Czech licence requirements apply if the service is carried out within the territory of the Czech Republic. As a matter of Czech law, it is not entirely clear when an activity is carried out within the territory of the Czech Republic. In 2013, the Czech National Bank issued a written statement (2013 CNB Statement) stating that, in respect of financial services, the key criterion for deciding whether a service is provided within the territory of the Czech Republic is the place of provision of the characteristic performance of the financial service, i.e. the place where the customer receives contractual performance for which the payment is due.

According to the 2013 CNB Statement, this general criterion implies the following: (i) where the financial service is provided in the simultaneous presence of both contracting parties or their representatives, the financial service is provided in that particular location (usually the place of business of the financial service provider in the presence of the customer); and (ii) the place of business of the financial service provider in another country constitutes the place of characteristic performance, provided that: (a) the performance of the financial service is provided at a distance (i.e. in a country where the financial service is solicited and can be utilised), but the customer actively sought the service provider in the other country; or (b) the contract was entered into in another country and it must have been clear to the customer that Czech law would not apply (the legal regime of the contract is irrelevant); in the case of both (a) and (b), assuming there was no marketing directed at the territory of the Czech Republic or towards the client, i.e. in the case of services provided at a distance, the characteristic performance will be located in the place where the service is solicited and from where it can be utilised. If the place of business of the financial service provider in another country constitutes the place of characteristic performance provided, Czech licensing requirements would not be triggered (Czech Reverse Solicitation).

Services provided prior to the end of the transition period

The Czech National Bank has stated in its public notices that if no deal between the EU and the UK is reached by 31 December 2020, then UK financial services providers need to cease all activities unless they take appropriate steps to comply with Czech law, i.e. obtain the relevant licence. Otherwise, UK financial services providers will only be authorised to carry on activities in the Czech Republic that are necessary to settle claims and debts arising from services provided and contracts entered into before the end of the transition period. Thus the regime will be similar to that which applies to a Czech financial services provider whose licence has been withdrawn.

The Czech National Bank expects UK financial services providers to inform clients affected by Brexit of the legal consequences thereof in respect of their rights and obligations arising from contracts and also of the actions that will be taken by UK financial services providers to settle claims and debts arising from those insurance contracts. The Czech National Bank also expects UK financial services providers to be able to provide evidence of having done so upon request.

Conclusion

In the event of a no-deal Brexit, passporting and other market access rights between the UK and the EU cease to apply after 31 December 2020, and traditional licensing obligations under Czech law for third-country firms will apply also to UK financial services providers. Such UK firms would be required to obtain a licence from the Czech National Bank to continue to provide services to clients in the Czech Republic unless Czech Reverse Solicitation applies.

FRANCE

In view of the upcoming end of the Brexit transition period on 31 December 2020, France is introducing a number of contingency measures in the financial services sector. The aim is to secure as much as possible the continued performance of contracts entered into before Brexit (ongoing contracts) and to allow for continued participation in various financial market payment infrastructures. The approach is consistent with the European Commission's contingency plan, which underlines the need for preparedness for all possible scenarios, it being noted that the most likely hypothesis would be the absence of a Brexit trade deal for financial services. The measures taken in France are described below.

French contingency measures

Future relations between the EU and the UK in the area of financial services will be structured around equivalence regimes that provide a relevant and appropriate legal framework. The European Commission – in conjunction with European supervisory authorities and Member States – is currently reviewing most existing equivalence regimes to this end.

With regard to French contingency measures, the French government issued in early 2019 a number of ordinances to prepare for a no-deal Brexit, which, at such time, was expected to occur at the end of March 2019 (the 2019 Ordinances). Benefiting from a delayed Brexit, the majority of the 2019 Ordinances were ultimately included in the Pacte Law[3], which entered into force on 23 May 2019. Such provisions, which aim to allow UK firms to continue their banking and financial activities in France and to ensure that French firms work with UK new third-country firms, are briefly summarised below:

- With respect to transactions on financial instruments and financial contracts, compound interest is allowed, including for interest due for a period of less than one year, contrary to the current condition requiring interest due for at least one year under article 1343-2 of the French civil code (*anatocisme*)[4].
- Spot FX (as well as precious metal derivatives and trades on CO2 emission allowances) is included in the scope of the safe harbour netting regime[5].
- Certain systemic third-country central bank money-based payment and securities settlement systems, such as CLS, CHAPS and CREST as well as third-country clearing houses, will retain the protection offered to the finality of payments made through such systems under the French SFD framework (please see below for further details on the SFD regime).
- The French Prudential and Resolution Supervision Authority (*Autorité de contrôle prudentiel et de résolution* or ACPR) continues to have the power to take enforcement action against UK firms that relied on the EU passport regime prior to Brexit, with respect to pre-Brexit activities. Likewise, the ACPR would also continue to ensure compliance with French law in relation to ongoing contracts concluded by such UK firms.
- The Financial Market Authority (*Autorité des marchés financiers* or AMF) is designated as the competent authority for the supervision of securitisation activities.

France – key points

- The French government has adopted measures applicable in the event of a no-deal Brexit on financial services.
- The French government considers that the loss of the European passport would not affect the legality of ongoing contracts entered into prior to Brexit.
- Clearing houses will be subject to a specific (simplified) clearing house licence instead of the ECB credit institution licence (unless required by the ACPR based on their activities).
- French participants in CLS, CHAPS and CREST and clearing houses are protected under the SFD regime.
- Mere performance of most ongoing contracts (including derivatives) will remain possible post-Brexit.
- Continuity of account opening services provided by UK firms will not be affected post-Brexit since characteristic performance is in the UK.

3. On 22 May 2019, France enacted a new legislation called *Plan d'Action pour la Croissance et la Transformation des Entreprises*, also known as the *Loi Pacte* (the **Pacte Law**).
4. Article L. 211-40-1 of the French *Code monétaire et financier*.
5. Article L. 211-36 of the French *Code monétaire et financier*.

- A temporary mechanism that facilitates financial constraints documentation repapering was created for UK firms that wish to transfer their business to EU branches or subsidiaries. Such a mechanism secures the migration of English law financial contracts documented by a master agreement (e.g. ISDA master agreements) relying on the conditions of French ordinary law governing the counterparty's silent consent. The window opened by such a mechanism for tacit counterparty acceptance of the contract migration closes after the lapse a period of 24 months following the entry into force of the Pacte Law (i.e. until 23 May 2021). This is available where the following cumulative conditions are met:

  i. the provisions of the new master agreement should be identical to the former master agreement concluded by the UK firm, with the exception of the applicable law and jurisdiction clauses, which should designate French law and courts, as well as any other clause necessary to perform the contract;

  ii. the entity offering the new master agreement should belong to the same group of companies as the UK firm and have a credit quality level identical to, or greater than, that of such initial UK firm at the time the new offer is received;

  iii. the offer should be made in writing in such form as set out in the former master agreement;

  iv. the EU branch should provide the client with documentation setting out the modified features of the new master agreement and the specific conditions for its conclusion; and

  v. the offer would be deemed accepted upon the expiry of five (5) working days from the receipt of the offer if the addressee has concluded a transaction or other operation governed by the new master agreement.

The French government is in the process of taking action with respect to those measures laid down by the 2019 Ordinances that were not made permanent in the Pacte Law in order to address the consequences of the end of the Brexit transition period. Thus, article 59 of law no. 2020-734 of 17 June 2020 empowers the French government to take, by way of ordinance, measures aimed at:

- with respect to specific rules for the management of collective investments whose asset complies with investment ratios in European entities, preserving the eligibility for a limited period of time of UK securities subscribed before the effective date of Brexit to the investment quotas in European assets applicable to equity savings plans (*PEA-PME*) and private equity funds; and
- securing the performance of insurance contracts validly entered into in France prior to Brexit with UK entities that will lose the benefit of the EU passport regime at the end of the transition period, in order to ensure that UK insurers will be able to make valid payment of claims.

The draft ordinances were approved by the CCLRF[6] on 17 September 2020 and are currently being reviewed by the French *Conseil d'Etat*.

It should also be noted that the 2019 Ordinances did not provide for any run-off regime in respect of ongoing contracts, as the French government considers that the loss of the EU passport regime by UK firms does not affect the majority of ongoing financial contracts. This was reflected in the report to the French President of the Republic accompanying the Ordinances. However, it is clear that the same UK firms will not be able to conclude any new contract with French residents after Brexit. Such an approach follows, in substance, the conclusions of the French High Legal Committee for Paris financial markets (*Haut Comité Juridique de la Place financière de Paris*, HCJP) (see below).

6. *Comité consultatif de la législation et de la réglementation financières* (CCLRF), which is the French consultative committee in charge of providing opinions and advice on draft legislation regarding the insurance and financial sectors.

Adapting financial market infrastructure – the new French legal framework

Another Brexit-related French government initiative is to modernise post-trade market infrastructures and, in particular, clearing houses/central counterparties (CCPs) and securities settlement systems (SSS). The Pacte Law has allowed French firms to access third-country interbank and securities settlement systems, such as CLS, CHAPS and CREST, by the protection offered by EU directives on the finality of payments made through these systems. The idea underpinning such legislative change is to preserve French firms' access to infrastructures critical to the EU financial system.

Optionality for credit institution status for a clearing house licence

French law used to require clearing houses to be licensed as credit institutions as a pre-requisite for a CCP licence. Such credit institution licence had to be obtained from the European Central Bank (ECB), following a proposal by the ACPR, having consulted the AMF and the French Banque de France.

The Pacte Law replaced the requirement for a credit institution licence with a requirement to obtain a specific clearing house licence from the ACPR. It should be noted, however, that the ACPR could still require a clearing house to obtain a credit institution licence, depending on the nature, volume and complexity of its business.

Preserving French firms' access to third-country financial market infrastructures

As from the effective date of Brexit, the UK Continuous Linked Settlement (CLS) payment system, and other UK interbank and settlement systems, will become third-country systems. As a result, if no change was made to French law, the Settlement Finality Directive (SFD)1 regime would no longer have applied to CLS, or any other UK interbank and settlement systems, so they would not have been regarded as systems under French law post-Brexit.

As a reminder, the purpose of the SFD regime is to remove systemic risk; for example, the risk that the default of a counterparty results in the default of other participants in the system or of the system itself. This is achieved through the irrevocable nature of transactions, which cannot be called into question under insolvency laws once they have been introduced into the system. Set-off instructions and operations are legally enforceable, including against third parties, provided that they have been submitted to the system prior to the expiry of the business day (as defined under the rules of the system) on which a court opens insolvency proceedings or prior to proceedings being launched against a participant, notwithstanding any legal provision or court decision to the contrary.

Further, under the SFD regime, in the case of an insolvency proceeding being instituted against a participant in an EEA system, the rights and obligations arising from or in connection with its participation are determined by the law governing the system, to the extent that such law is that of an EEA jurisdiction. This does not apply when the system is governed by the laws of a country outside the EEA. Therefore, in such a case, French insolvency common law would apply to the participant.

As a result, the fact that if no change was made to French law interbank and settlement systems, notably those providing for foreign currency exchange, such as CLS, would no longer have been recognised as a system under French law would have created a legal uncertainty, both on the part of the French firm (which would have been prevented from participating in such systems and there would be no existing alternative), but also from the perspective of the systems involved.

To remedy this issue, the Pacte Law implemented recital No. 7 of the SFD, which allows Member States to extend the benefit of the provisions of the SFD regime to third-country systems. As a result, the SFD regime (including the protections on the insolvency of a participant) would continue to apply to those third-country systems, which will be subject to a recognition decision by the French Ministry of the Economy under the Pacte Law.

It should be noted that, on 21 September 2020, the European Commission adopted a time-limited equivalence decision for CCPs in view of EU financial stability considerations, which extends market access to UK CCPs for 18 months after the expiry of the Brexit transition period. This temporary equivalence decision for the UK legal framework on clearing derivatives permits UK CCPs to continue supplying their services to EU market participants seamlessly and without being subjected to the uncertainty attached to the state of play of the trade negotiations on financial services between the UK and the EU, while, at the same time, ensuring that financial stability is sustained.

Following the European Commission's decision, ESMA announced on 28 September 2020 that ICE Clear Europe Limited, LCH Limited and LME Clear Limited will be recognised as third-country CCPs (TC-CCPs) eligible to provide their services in the EU after the end of the transition period following the withdrawal of the UK from the EU on 31 December 2020.

HCJP reports on Brexit

Over the last couple of years, the HCJP has carried out an assessment of the impact of Brexit on the access by UK entities to the EU market and the impact on ongoing contracts (the relevant report is available in French **here**). More recently, the HCJP carried out further analysis of Brexit's impact on:

- insurance activities and published a report in September 2018 (available in English **here**);
- asset management and published a report in September 2018 (available in French **here**); and
- banking and investment services and published a report in November 2018 (available in English **here**).

The HCJP group that worked on contract continuity in the banking and investment services sectors was composed of, among others, representatives of:

- the French supervisory authorities (namely, the AMF and the ACPR), the *Banque de France* and the French treasury;
- major French financial institutions and financial industry associations (FBF, AMAFI); and
- academics, law firms[7] and legal experts.

The HCJP banking and investment services report covers the following services:

- Banking transactions, payment services, issuance and e-money management.
- Investment services, though excluding underwriting and placement services, and operation of an MTF (Multilateral Trading Facility) or an OTF (Organised Trading Facility).

The HCJP banking and financial services report – main findings

In its report on the impact of Brexit on the banking and investment sectors, the HCJP says that, in the absence of any French or European law provision related to the consequences of the loss of the European passport regime, a specific regime should be introduced under French law. This would be similar to the current French law regime relating to the management of ongoing agreements in the event of a licence withdrawal. However, to our knowledge, such a solution does not seem to be currently contemplated by the French government.

The HCJP states, as a general rule, that the validity of ongoing contracts must be assessed at the time they were entered into (i.e. pre-Brexit, where UK firms were still capable of relying upon the EU passport regime). The performance of ongoing contracts should not be brought into question post-Brexit to the extent that such a performance does not entail the characteristic performance of a regulated service in France. In other words, no new regulated services must be provided in France post-Brexit.

Where applied to various banking and investment services, the outcome of such an approach would be the following:

(1) **Financing contracts:** to the extent that the parties would have been irrevocably committed before Brexit, the contract will continue post-Brexit.

7. Including Clifford Chance.

For example, reimbursement of funds under a loan agreement (that was entered into prior to Brexit) may take place post-Brexit. However, the continuation of a financing contract might be jeopardised if those conditions precedent which are exclusively under the lender's control were not met before Brexit or if the characteristics of the financing contract are materially amended (e.g. an increase of the facility amount).

(2) **Derivatives and repo contracts:** Brexit should not affect the continuity of derivatives contracts, in particular regarding life cycle events, as long as the contract was validly entered into before Brexit. For example, the exercise of an option or the payment and settlement on the initially agreed date will be viewed as a mere performance of the relevant contract which may take place post-Brexit. Conversely, an event that would substantially amend the contract may qualify as the provision of a new regulated service. This would be, for instance, in the case of the extension of a maturity, the increase of the nominal or rolling of a position, and the novation or renegotiation of terms and conditions.

(3) **Account opening services:** with respect to deposit accounts and correspondent banking services offered by a UK-based entity to clients located in France on a cross-border basis, the HCJP considers that the characteristic performance of such services would take place outside France. Accordingly, such services should fall outside the territorial scope of application of the French licensing requirements, provided that no solicitation of French clients has taken place beforehand. In the absence of published case law and any official guidance or position from the French regulatory authorities, the HCJP is of the view that the same approach should apply to payment services.

The HCJP report also analyses the various options that UK firms have to provide banking and financial services within the European market post-Brexit. Among other options, the HCJP considers that outsourcing arrangements may be put in place between the locally licensed branch or subsidiary of the UK firm and its head office in the UK. Such outsourcing is subject to the following limitation; in particular, the substance of the activity must, in any event, remain within the locally licensed entity/branch, it being noted that compliance with such a requirement would have to be assessed by the relevant local authorities.

GERMANY

German licence exemption for cross-border own account trading

With the end of the Brexit transition period on 31 December 2020 approaching, UK firms will lose the right to operate in Germany under the EU passport regime. While it seems unlikely at this point that comprehensive exemptions allowing UK firms to do business in Germany will be implemented to take effect after that date, a licensing exemption for cross-border own account trading (*Eigengeschäft*) for non-EEA entities was introduced earlier this year and continues to be available post-Brexit.

Dealing on own account versus trading on own account

The German Banking Act (*Kreditwesengesetz,* KWG) distinguishes dealing on own account (*Eigenhandel*) and trading on own account (*Eigengeschäft*) as two separate licensable investment services under the KWG.

Pursuant to section 1 para. 1a no. 4 KWG, dealing on own account is:

a) The continuous offering to purchase or sell financial instruments at self-determined prices (**Market Making**);

b) The organised, frequent and systematic dealing on own account on a substantial basis when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system (**Systematic Internalisation**);

c) The purchase or sale of financial instruments for own account as a service to others; or

d) The purchase or sale of financial instruments for own account as a direct or indirect participant in a

Germany – key issues

- Mere own account trading by non-EEA entities with counterparties based in Germany is not subject to a licence (including where such entity conducts banking business or provides investment services under a BaFin waiver pursuant to section 2 para. 5 KWG).
- Non-EEA entities would not require a licence for own account trading as participants or members of German exchanges or trading venues.
- Own account trading via direct electronic access and dealing on own account continues to be licensable.

domestic regulated market or a multilateral trading facility via a high-frequency, algorithmic trading scheme characterised by (i) infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry: co-location, proximity hosting or high-speed direct electronic access, (ii) system-determination of order initiation, generation, routing or execution without human intervention for individual trades or orders and (iii) by a high volume of intraday reports in the form of orders, quotes or cancellations, also where no service is provided to others (**High Frequency Trading**).

Trading on own account means the purchase and sale of financial instruments for own account (section 1 para. 1a sentence 3 KWG) which is no dealing on own account, i.e. which is no "service to others" (see item c) above). Hence, purchasing and selling financial instruments for own account without providing a service to others qualifies as trading on own account, whereas acting on own account to fill orders received from a client qualifies as dealing on own account.

Own account trading triggers a German licence requirement, among others, pursuant to section 32 para. 1a KWG if:

a) own account trading is conducted in addition to licensable banking business and investment services other than financial leasing, factoring, foreign exchange business or AIF-related custody business;

b) own account trading is conducted as a participant or member of a regulated market or multilateral trading facility (MTF) or by using direct electronic access to a trading venue irrespective of whether additional banking business or investment services are conducted; or

c) own account trading is conducted in commodity derivatives or emission allowances or derivatives thereof.

This regime was introduced in early 2018 when implementing Directive (EU) 2014/65 (MiFID II). Until mid-2018, non-EEA firms could rely on grandfathering (section 64x para. 8 KWG) in relation to items b) and c) above, i.e. they could continue own account trading as members or participants of a German regulated market or an MTF or via direct electronic access or in commodity derivatives or emission allowances or derivatives thereof if a complete application for a waiver pursuant to section 2 para. 5 KWG had been submitted.

Own account dealing/own account trading under German law

- Dealing on own account (*Eigenhandel*) is the purchase and sale of financial instruments for own account as a service to others, usually to fill orders received from clients (it also includes market-making, systematic internalisation and high-frequency trading).
- Trading on own account (*Eigengeschäft*) means the purchase and sale of financial instruments for own account which is not qualified as dealing on own account, i.e. which is lacking a "service element" and is not related to a (potential) client transaction

Exemption for own account trading by third-country firms

Since 28 March 2020, a licence for own account trading pursuant to section 32 para. 1a KWG is not required if own account trading on German exchanges or trading venues is conducted by non-EEA entities as participants or members of such exchange or trading venue (the Own Account Exemption). The Own Account Exemption will apply until the European Securities and Market Authority (ESMA) publishes a decision on a non-EEA entity's application to be entered in ESMA's register of third-country firms pursuant to Article 48 MiFIR.

When proposing the law, the German Federal Government stated that it considered the Own Account Exemption reasonable because members or participants of (supervised) exchanges or trading venues are already subject to the venue's admission and trading rules and are supervised by the exchange authorities and BaFin.

The German Federal Government deems the level of supervision sufficient until access rights have been harmonised within the EU. It also clarified that the licence requirements for own account trading are triggered only where the third-country entity (including a UK firm) provides licensable banking business and investment services and holds a German banking licence pursuant to section 32 para. 1 KWG. Mere own account trading by non-EEA entities with counterparties based in Germany does not trigger licence requirements, including where such entity conducts banking business or provides investment services under a BaFin waiver pursuant to section 2 para. 5 KWG. This is because, in contrast to own account dealing, own account trading does not include any client-related service and hence does not "target" the German market. The Own Account Exemption does, however, not extend to own account trading via direct electronic access to a German trading venue, which continues to be a licensable activity.

Certain other exemptions apply, e.g. where own account trading is conducted in commodity derivatives or emission allowances or derivatives thereof by entities which do not belong to a banking group and such trading is to be considered an ancillary activity.

Consequences and remaining questions

The exemption applies solely to own account trading but not own account dealing. Hence, purchasing and selling financial instruments as a service to others as well as Market Making and high-frequency trading continue to trigger licence requirements if conducted "in Germany". Based on the long-established German cross-border regime, an activity is conducted in Germany if it targets persons or entities resident in Germany. Hence, solicitation triggers licence requirements if no other exemptions apply; conversely, German residents may request services from non-German service providers without triggering licence requirements for such service providers if there was no prior solicitation attributable to such service providers – the "passive rendering of services exemption."

ITALY

Further to the ratification for the UK's withdrawal from the EU (which avoided a no cliff-edge scenario), the European legislation continues to apply until 31 December 2020. At the end of such new temporary period, UK institutions will be subject to the Italian third-country regimes and, in the absence of an authorisation by the Italian competent authorities, they will not be able to operate in Italy.

Consob, Bank of Italy and Ivass (the Italian authorities in charge of oversight, respectively, of the financial, banking and insurance sectors) have issued statements following the ratification of the withdrawal agreement and/or memoranda of understanding (which fulfil one of the conditions envisaged by the Italian and UK legislations for authorising regulated institutions to operate in Italy and vice versa).

Third-country regime

UK institutions that intend to continue to carry out services in Italy after the end of the transition period (i.e. 31 December 2020) must submit their application to obtain an Italian licence (as a third-country institution) or establish an Italian-regulated entity. Yet another alternative is, obviously, to transfer the business to a licensed regulated entity established in another EU Member State, which could then 'passport' into Italy.

UK-regulated institutions that could have benefited from the Italian third-country regime, but failed to take the necessary steps in time (i.e. file an application), and thus failed to obtain an Italian licence or establish an Italian-regulated entity, must cease their Italian operations by the end of the transition period.

More details are provided below.

Banking sector (including payment and e-money institutions)

At the end of the transition period, UK banks, payment and e-money institutions providing services in Italy will be subject to the rules set out in the Italian Banking Act and Bank of Italy second-level regulations.

The regulations applicable to the financial institutions for which the Bank of Italy is the competent authority depend on the type of institution and the activities performed in Italy:

- *UK banks and electronic money institutions operating in Italy through a branch that intend to continue operating in Italy as third-country institutions*. These institutions can continue operating in Italy after the end of the transition period, in accordance with, and within the limits provided for by, Italian law, only if they have obtained a licence as a third-country institution in accordance with Italian law before the end of the transition period. The provision of investment services by third-country banks on a cross-border basis is only allowed to eligible counterparties and per se professional clients. Third-country banks can only provide investment services to other clients through a branch. Therefore, by the end of the transition period, UK banks must cease the provision of investment services on a cross-border basis to clients other than eligible counterparties and per se professional clients.
- *UK electronic money institutions currently operating either under the freedom to provide services or through a network of agents, payment institutions, and asset management companies*. These institutions cannot be licensed to operate as third-country institutions, and are therefore required by law to cease operations by the end of the transition period. That is, they are required either to transfer the activity to an institution authorised to operate in Italy (which could be an institution licensed in Italy or an EU institution 'passported' into Italy) or to cease their activity by that date in an orderly fashion.
- *UK banks and e-money institutions operating in Italy through a branch not licensed (for whatever reason) before the end of the transition period, and UK banks providing investment services on a cross-border basis to clients other than eligible counterparties and per se professional clients*. These institutions have a duty to cease operations by the end of the transition period. The same duty also applies to UK banks and electronic money institutions operating in Italy through a branch that do not intend to continue operating in Italy as licensed third-country institutions.

Accordingly, institutions that intend to continue operating in Italy either need to obtain a licence as a third-country institution, where this is allowed[8] (i.e. UK banks, except those offering investment services on a cross-border basis to clients other than eligible counterparties and per se professional clients, and UK e-money institutions operating in Italy through a branch), or to transfer their Italian activities to an Italian institution (existing or newly established) or to an EU-licensed institution 'passported' into Italy. On the other hand: (i) UK banks and e-money institutions operating in Italy through a branch that intend to cease operations; (ii) banks that must cease operations relating to investment services (see above); and (iii) UK payment institutions, e-money institutions operating either under the freedom to provide services or through a network of agents and asset management companies that are required to cease operations are all required to wind down their Italian activities by the end of the transition period.

Therefore, in order to avoid any discontinuity of services to customers and to ensure an orderly cessation of activity where required, the Bank of Italy recommends that:

- all financial institutions that intend to continue operating in Italy, either as a third-country institution or by transferring their activity to a newly established Italian institution, file an application in due time, taking into consideration the statutory duration of licensing procedures and the regulation on administrative procedures. If the application is not filed in time, financial institutions should be prepared to guarantee the cessation of all activities by the end of the transition period;
- all financial institutions that intend to transfer their activity to an EU financial

8. In particular, third-country banks that intend to continue operating in Italy shall submit an application for authorisation to the Bank of Italy, which ascertains the fulfilment of conditions for the issue of the authorisation within a period of 120 days, except in cases of suspension or interruption.

institution 'passported' into Italy complete the procedures for passport notification and transfer of the activity by the end of the transition period; and

- all financial intermediaries that intend, or are required, to cease their activity, end their relationships with customers in an orderly fashion by the end of the transition period, and transmit their closure plans to the Bank of Italy as soon as possible, using the templates available on the Bank of Italy website.

Regardless of the type of institution involved or the activity performed, all UK institutions currently operating in Italy are required to inform customers of their Brexit-related initiatives and the related impacts on existing contracts.

Investment services sector (when entities other than banks are involved)

At the end of the transition period, UK investment firms providing investment services and activities in Italy will be subject to the rules set out in the Italian Financial Act and Consob second-level regulations.

In particular, pursuant to the aforementioned rules, third-country firms other than banks that intend to continue operating in Italy shall submit an application for authorisation to Consob, which ascertains the fulfilment of conditions for the issue of the authorisation within a period of 120 days, except in cases of suspension or interruption. Therefore, a firm that does not submit the application within a time frame compatible with the duration of the proceedings may need to cease operation by the end of the transition period.

In light of the aforementioned rules, Consob has recommended that UK investment firms wishing to continue operating in Italy, either as third-country firms[9] or by transferring their business to an Italian investment firm (SIM) established for this purpose, submit the application for authorisation promptly, also taking into consideration that the duration of authorisation procedures can be subject to suspension and interruption.

Consob has invited UK investment firms that intend to continue operating in Italy by transferring their activities to an EU investment firm to complete such transfer by the end of the transition period and, where necessary, the procedures for passport notification into Italy.

UK investment firms that intend, or are required, to cease their operations by the end of the transition period shall terminate their relationships with clients in ways that prevent the latter from being prejudiced and in compliance with the notice deadlines for the contract termination. These firms shall report the termination to Consob, specifying whether the cessation of operations has already been notified to the competent UK authorities.

All UK investment firms are required to provide Italian clients with up-to-date information on the consequences of the changed operating conditions deriving from Brexit.

Insurance sector

At the end of the transition period, UK insurance undertakings providing services in Italy will be subject to the rules set out in the Italian Insurance Act and the Ivass second-level regulations.

In particular, pursuant to the aforementioned rules, third-country insurance undertakings that intend to continue operating through the establishment of a branch[10] in Italy shall submit an application for authorisation to IVASS, which ascertains the fulfilment of conditions for the issue of the authorisation within a period of 90 days, except in cases of suspension or interruption. Therefore, an insurance undertaking that does not submit the application within a time frame compatible with the duration of the proceedings may need to cease operations by the end of the transition period.

Ivass has invited UK insurance undertakings that intend to continue

9. By the establishment of a branch or under the freedom to provide services (in the latter case, only towards eligible counterparties and per se professional clients).

10. No cross-border licence is available.

operating in Italy by transferring their activities to an EU insurance undertaking to complete such transfer by the end of the transition period and, where necessary, the procedures for passport notification into Italy.

Insurance undertakings must inform clients about the changes planned in view of Brexit to ensure continuity of service in Italy (e.g. change of company form, relocation of the registered office in another EU country, transfer of policies to another company in another EU country with simultaneous possibility of withdrawal) and how these action plans will affect the contracts already signed and their management. This may include, for example: i) information about the change of contractual counterparty and the right of withdrawal, in cases where the policy portfolio is transferred to another company; or ii) the loss of protection provided by a national guarantee fund, in cases where policies are transferred to a company in a country where no such fund exists.

LUXEMBOURG

No measures have yet been taken or announced in anticipation of a "cliff edge" Brexit scenario, .i.e. where no agreement is reached between the UK and the EU before the deadline expires at the end of the year. The measures created by the law of 8 April 2019 concerning measures to be taken in relation to the financial sector in the event of Brexit, and amending relevant laws governing the financial sector, the investment fund industry and the insurance sector, published in the Luxembourg official journal (Mémorial A) on 11 April 2019 (the Brexit Law), are no longer in force and, as a result, the temporary permissions regime set up by the financial sector supervisor (the Commission de Surveillance du Secteur Financier, hereinafter the "CSSF") in 2019 is no longer in force.

Assuming the UK credit institutions and investment firms will be treated as third-country firms (TCF) in accordance with the provisions of the law of 5 April 1993 on the financial sector (as amended) (the FSL), they would be able to continue to engage with Luxembourg clients either by setting up a local branch or by operating in such a way that no licence requirement is triggered, which, subject to certain specific conditions, includes operating in such a way that the characteristic performance of the relevant service would not be, or considered to be, located in Luxembourg. The criteria for non-MiFID and MiFID investment services may not be identical in this respect and specific advice should be sought on this point.

In respect of the provision of MiFID investment services and activities (including ancillary services thereto), a TCF could also rely on the national equivalence regime (if the CSSF decides that the UK is an equivalent jurisdiction). This latter basis is subject to the aforementioned formal decision that the UK is an equivalent jurisdiction and subject to the condition that the relevant firms only providing services to "per se" professional clients and/or eligible counterparties – it may not be used in relation to other professional clients or retail clients.

Please see below a brief summary covering the question on localisation of services and the national equivalence regime.

Localisation of services – MiFID and non-MiFID regulated services

The provision of MiFID and/or non-MiFID regulated services would not require a licence if it is not considered to take place in Luxembourg. There is, however, a different standard of review between MiFID and non-MiFID financial services.

For MiFID regulated services, although there is no clear definition of what is meant by provided in Luxembourg ("*fourni au Luxembourg*"), CSSF Circular 19/716 (as amended) clarifies that the investment service is presumed to be provided in Luxembourg ("*fourni au Luxembourg*") if one of the following conditions is met: a) the TCF has an establishment (for example, a branch) in Luxembourg; b) the TCF provides an investment service to a retail client established or located in Luxembourg; and c) the place where the "characteristic performance" of the service (this is to say, the essential service for which payment is due) is performed is Luxembourg. The CSSF recognises the fact that there may be particular situations where, although the TCF provides an investment service to a client, other than a retail client, established or located in Luxembourg, such service may be considered as not being rendered in Luxembourg ("*au Luxembourg*"). The TCF must carry out the above analysis before providing any service and must document and preserve such analysis. For retail clients, the "own exclusive exemption" regulated under art 42 of MiFID (as implemented in Luxembourg by the FSL) could be applied; as this exemption may be applied in respect of all client types.

A TCF not having an establishment in Luxembourg which provides non-MiFID financial services regulated under the FSL (e.g. deposit taking, lending) requires a licence only if one or more of its agents physically come to Luxembourg on an occasional and temporary ("*occasionnellement et passagèrement*") basis, in particular to collect deposits or other repayable funds from the public or to provide any other services (other than MiFID-regulated services). The presence of the client in Luxembourg does not ipso facto mean that the TCF exercises its activities (other than MiFID-regulated services) in Luxembourg. The CSSF Circular 11/515 providing more guidance on this matter is currently under review. As a result, it is recommended to check the status of this circular and the other legal provisions before deciding to act.

National Equivalence Regime – MiFID-regulated services

The national equivalence regime provides for the possibility of a TCF to provide MiFID investment services and activities (including ancillary services thereto) to "per se" professional clients and/or eligible counterparties on a cross-border basis without establishing a branch.

The national equivalence regime applies where the European Commission has not yet taken an equivalence decision or during the transitional period after the taking of such decision where the TCF chooses to benefit from the transitional arrangement and to continue to use the national equivalence regime (for up to three years).

A TCF can rely on the national equivalence regime to provide services in Luxembourg if (i) the CSSF has taken an equivalence decision for the jurisdiction in which the TCF has its central administration or its registered office (i.e. in this case, the UK) and (ii) the CSSF has informed the relevant TCF that the conditions of Article 32-1 (1) para. 2 of the FSL are complied with.

While the UK has so far not been declared an equivalent jurisdiction, the CSSF accepts precautionary applications under this regime from UK firms.

Provision of services on the basis of specific FSL exemptions

In addition to the above, a TCF could provide both non-MiFID and MiFID financial services without triggering a licensing requirement on the basis of specific exemptions provided under Article 1-1 of the FSL. These are, however, limited in number, presuppose meeting certain conditions and are to be interpreted and applied in a restrictive way. One such exemption is the provision of services intragroup.

In addition to the exemptions mentioned above, for MiFID investment services only, there is an additional exemption – the own exclusive initiative exemption (i.e. where a client established or located in Luxembourg initiates at its own exclusive initiative the provision of an investment service or activity by a TCF). However, when relying on this exemption a TCF must evaluate the situation for each service and on a continuous basis. It shall take into consideration (in particular) the ESMA Q&A on MiFID II and MiFIR investor protection and intermediaries topics, as amended from time to time. It is further noted (in the context of this exemption) that client initiative does not entitle the TCF to market new categories of investment products or investment services to that client.

Investment Funds/Delegation of Portfolio Management

Requirement at the level of the Luxembourg AIFM or UCITS ManCo

The delegation of all types of portfolio management (whether collective or discretionary) by a UCITS management company or an AIFM is specifically provided for under Luxembourg law,[11] and is widely used in practice. Where the delegate portfolio manager is based outside the EU, a co-operation agreement must be in place between the Luxembourg regulator and the delegate's regulator. On 1 February 2019, ESMA issued a press release[12] confirming that a memorandum of understanding (MoU) has been agreed with the FCA which will only be effective in the event of a no-deal Brexit. The MoU covers supervisory cooperation, enforcement and information exchange between individual European regulators and the FCA and will allow them to continue sharing information relating, but not limited, to market surveillance, investment services and asset management activities. Therefore, the above requirement to have a co-operation agreement in place should be satisfied in the event of a no-deal Brexit.

Requirements at the Level of the Delegate

To the extent that the services provided by the delegate qualify as MiFID services, the delegate (TCF) might fall under the Luxembourg third-country firm regime as outlined above.

THE NETHERLANDS

The Netherlands has not introduced specific legislation for regulatory permissions in respect of financial services in the event of a no-deal Brexit as per the end of this transitional year. The provision of financial services by UK financial institutions to Dutch clients will, therefore, need to be reviewed against the background of general financial services legislation and guidance given by the regulators.

Investment services

The Netherlands had introduced a temporary permissions regime for the provision of MiFID investment services to allow for ongoing service provision in the event of a no-deal Brexit as per the end of March 2019. The market had anticipated for some time that this temporary permissions regime would also be available at the end of the current transitional year, but the Dutch government has indicated that it is currently not planning to activate such regime. According to the Dutch Minister of Foreign Affairs, UK firms have now had ample time to prepare and make alternative arrangements.

This means that the provision of investment services is subject to the traditional licensing, exemptive relief and reverse solicitation regime. This does not place UK firms in a position different from that of any other third-country firm[13]. A licence requirement applies if the client is in the Netherlands unless an exemption is available or the client has not been solicited.

An exemption which is available to investment firms in third countries is the so-called own account trading exemption. This is in addition to the MiFID own account trading exemption.

Firms that are genuinely dealing on own account in the Netherlands but cannot satisfy the conditions attached to the MiFID dealing on own account exemption, i.e. that they must not be a market maker, a member of a regulated market or an MTF or applying a high-frequency algorithmic trading technique, cannot rely on the MiFID dealing on own account exemption; however, if they are a firm from outside the EEA (e.g. in the UK) they can still rely on the (additional) domestic dealing on own account exemption (the so-called Article 10a exemption). This exemption also comes with a restriction/condition, namely that the firm must trade in the Netherlands, in short, with persons that are permitted

11. See article 110 of the law of 17 December 2010 concerning undertakings for collective investments (as amended) and Article 18 of the law of 12 July 2013 concerning alternative investment fund managers (as amended).
12. https://www.esma.europa.eu/press-news/esma-news/esma-and-eu-securities-regulators-agree-no-deal-brexit-mous-fca
13. A permanent exemption applies to investment firms in the US, Australia and Switzerland but it is not expected that the UK will be added to this group.

(as a matter of Dutch law) to provide investment services or deal on own account in the Netherlands, either by having a licence or by relying on an exemption.

Banking, payment and insurance services

The Dutch Central Bank has recently issued a fact sheet in which it sets out which services can be provided post-Brexit on an unregulated basis. The table below reproduces the information set out in the fact sheet, which clarifies at a very high level which services can still be provided. The table confirms the application of existing legislation to third-country financial institutions but introduces the concept of 'passive servicing'. Essentially, the table confirms the position under Dutch law that deposit-taking is allowed from professional market parties but not from retail customers. A separate non Brexit-related published reverse solicitation regime is available for payment services.

Table – Cross-border financial services provision allowed to Dutch customers by UK firms after 2020 (non-exhaustive)*

	Type of service	Cross-border services provision allowed under Dutch law	Passive servicing allowed under Dutch law**	Authority responsible in the Netherlands
UK insurers	Life insurance, general/non-life insurance	May temporarily still be allowed in 2021 (see below)	Yes, in the case of life insurance products; depends, in the case of non-life (see below)	DNB
UK reinsurers	Reinsurance	Yes	Yes	DNB
UK credit institutions (Dutch retail customers)***	Deposit-taking (savings account, current account)	No	No	DNB
UK credit institutions (Dutch professional market parties)	Deposit-taking (savings account, current account)	Yes (see below)	Yes (see below)	DNB
UK payment firms and electronic money institutions	Payment and electronic money services	No	No	DNB

* This table assumes that the Brexit transition period is not extended and no alternative arrangements between the EU and the UK will be in place from 2021.

** Defined here as service that was concluded by a UK firm with a customer living in the UK at that particular moment, but who has since then moved back to the Netherlands, with the provision of the service continuing (also after the Brexit transition period).

*** The Dutch Authority for Financial Markets (AFM) is the responsible authority in the Netherlands in the case of cross-border services in the areas of mortgage loans, credit cards, other loans and overdraft facilities.

Poland – key issues

- New regulations allow investment firms from third countries that are OECD and FATF members to be parties to transactions entered into on a trading venue in Poland when acting on their own account or for the account of clients from non-EU/EEA countries.
- Investment firms from third countries are able to use the service of direct electronic access (DEA) to a trading venue in Poland to transact on their own account or for the account of clients from non-EU/EEA countries.

POLAND

New rules allow third-country investment firms to access Polish trading venues

Polish law sets out the rules under which investment firms from third countries (i.e. non-EU/EEA countries) may provide investment services in Poland. The Parliament has adopted new regulations that provide for the terms on which third-country firms that do not provide investment services in Poland are able to access Polish trading venues.

Participation in a regulated market, an MTF or an OTF

The new regulations enable third-country investment firms that do not provide investment services in Poland to be parties to transactions entered into on a regulated market, a multilateral trading facility (MTF) or an organised trading facility (OTF) in Poland. This will be possible subject to certain conditions.

First, this does not apply to investment firms from all third countries, only to firms from those third countries that are OECD and FATF members (and therefore it will apply to UK investment firms post-Brexit). The firm must also hold a licence in, or provide services consisting of, trading in financial instruments on another basis in the country where its registered seat is located and must be subject to supervision by the competent authority in that country.

Second, this does not apply to all transactions entered into by the investment firm on the venue, only to transactions for the sale or purchase of financial instruments:

- on its own account (but the firm will not be able to act as a market maker on the Polish trading venue); or
- for the account of its clients, but only those who have a place of residence or registered seat in the territory of a non-EU/EEA country.

Third, there must be a bilateral or multilateral agreement in place between the competent authority in the country where the registered seat of the investment firm is located and the Polish financial supervision authority (*Komisja Nadzoru Finansowego, KNF*) providing for cooperation and the effective exchange of information, or the exchange of information must be otherwise ensured between such competent authority and the KNF, as necessary for the purposes of supervision by the KNF of the activities of the third-country investment firm on the Polish trading venue.

The new regulations also provide that if the transactions entered into as described above are derivatives admitted to trading on a Polish regulated market, then the derivatives may be recorded in accounts outside Poland.

Investment firms operating pursuant to these regulations will be subject to certain additional obligations, including the obligation to submit documents and information to the KNF upon request and the obligation to pay supervision fees to the KNF. In addition, the new regulations give the KNF powers to impose fines on these investment firms for contraventions of Polish requirements.

Direct Electronic Access (DEA)

Under the new regulations, third-country investment firms that do not provide investment services in Poland are allowed (without needing to be authorised in Poland) to access a Polish trading venue via direct electronic access (DEA) services provided by a member of, or a participant in, the trading venue. This applies only to transactions for the sale or purchase of financial instruments by the firm:

- on its own account (the firm will not be able to act as a market maker on the trading venue); or
- for the account of its clients, but only those who have a place of residence or registered seat in the territory of a non-EU/EEA country.

The provisions of the new regulations relating to the use of DEA services do not specify that they only apply to third-country investment firms from OECD and FATF members. However, it seems that the legislator's intention was to limit the scope of use of DEA services in this way so that the services could be used only by entities that may be a party to transactions on the trading venue in accordance with the other provisions described above.

Conclusion

The new regulations will be particularly significant for UK investment firms in light of Brexit. For example, after Brexit, the regulations will allow UK investment firms to operate as remote members of the Warsaw Stock Exchange (*Giełda Papierów Wartościowych w Warszawie S.A.*) and to conclude transactions in Poland using DEA services provided by members of the Exchange, within the limitations discussed above.

ROMANIA

While negotiations between the EU and the UK on their future relationship are still ongoing, there have been no significant developments with respect to the Romanian authorities' approach in their respective competence areas in relation to the status at the end of the transition period.

Banking and payment services sector

The National Bank of Romania (NBR) issued a press release on 18 February 2020, after the Withdrawal Agreement entered into force, analysing the potential impact of Brexit on the banking, payment and electronic money issuance services in Romania, highlighting only that, according to the Withdrawal Agreement, as concerns the provision of financial services in Romania, the UK will continue to observe the EU acquis throughout the transition period (i.e. until 31 December 2020) and UK entities will continue to benefit from the single EU passport regime, based on the authorisation granted by the competent authority in the UK.

No further measures have been put in place for the end of the transition period; as such, it could be expected that the NBR reverts to the approach set out in its statements issued in February 2019 where it stated that the UK entities providing banking and payment services as well as electronic money issuance services in Romania would no longer benefit from the single EU passport regime, and would be treated as third-country entities. Consequently, in the absence of a licence from the NBR, the activity of the Romanian branches of the above-mentioned UK entities, and the direct provision of services in Romania by these entities, would cease as of the date of the end of the transition period.

In the previous "no-deal" context, NBR advised the users of services provided by these entities in Romania to contact the relevant service providers to check if they have a strategy for avoiding disruptions in the relationships with customers and ensuring service continuity, or terminating the contractual relationships, as the case may be.

Non-banking financial markets

Similarly, on 20 March 2019, the Financial Supervisory Authority (FSA) issued a warning that, in the event of a no-deal Brexit, the trade relationship between the EU and the UK would only be governed by the provisions of multilateral trade agreements and spot contracts between the European authorities, national authorities and those from the UK. Furthermore, the FSA stated that UK entities operating on non-banking financial markets would have the status of third-country entities and would no longer be authorised to carry out activities in other EU Member States on the basis of the EU passport regime.

While the FSA issued Regulation no. 1/2020 on the application of certain measures in the event of a no-deal Brexit, which provided for certain transitional measures in relation to existing insurance agreements, it would appear that such Regulation would have been applicable only if no Withdrawal Agreement was agreed.

Hence, in absence of any additional guidelines, it could be expected that the FSA also reverts to the approach from March 2019 mentioned above. Based on that approach, relevant UK entities could operate on Romanian territory only if they fulfil the licensing procedures applicable to third-country entities, and would be further supervised by the FSA in accordance with Romanian legislation.

At that time, the FSA mentioned also that, in order to avoid any disturbances, all entities operating on the non-banking financial market that would be affected by the UK's new statute must take the necessary steps (including from an administrative point of view) to ensure that the services and consumer protection rights are still served. In this context, in the previous "no-deal" scenario, the FSA recommended that these entities should ensure timely provision of clear information to those clients whose contracts may be affected and should mention at least the following: (i) the impact of the withdrawal from the EU on the relevant contract; (ii) the actions which will be undertaken by the relevant entity in order to minimise the potential negative impact on risks; and (iii) the risks, the consumer's contractual rights and the contact addresses for additional information.

Global Depositary Receipts (GDRs)

The FSA also enacted a new regulation (Regulation no. 4/2019) in order to clarify that the current legal regime applicable to GDRs which have underlying asset shares issued by Romanian companies will continue to apply to those GDRs which are already admitted to trading on a UK stock exchange.

The current legal regime will also continue to apply to those GDRs which: (i) have Romanian shares as underlying assets; (ii) will be admitted to trading on a third-country market which is equivalent to the regulated markets; and (iii) will be issued and listed on the basis of a prospectus published and approved by the competent authority of that third country and whose content is similar to that provided under the EU regulations.

SPAIN

On 1 March 2019, a piece of legislation[14] intending to avoid a cliff-edge scenario was enacted but its entry into force was conditional upon the UK withdrawal from the EU without an agreement between UK and the EU being entered into. Further to the ratification of the Withdrawal Agreement this legislation will now not enter into force at the end of the Brexit transition period on 31 December 2020. As such, UK financial institutions will be subject to the Spanish third country regimes and, without authorization by the Spanish regulators, would not be able to operate in Spain, unless a new provision providing otherwise is enacted[15].

Pursuant to Spanish provisions and the views expressed by Spanish regulators it appears that the regime applicable to UK financial entities will be the following: The principle of continuity of contracts will apply and existing contracts will continue to be binding for the parties. However, existing contracts cannot be amended where the amendment entails providing new services into Spain or affects the main obligations of the parties, the contracts cannot be renewed or performed where the activities linked to the management of the contract require a license. In all these cases or if new contracts are intended to be entered into, the institution would need to be authorized to operate in Spain or would otherwise need to transfer the agreements to an entity that could provide the services or terminate them in an orderly manner.

Investment services

Providing investment services into Spain by a UK firm is subject to first obtaining a cross-border license from the Bank of Spain ("**BoS**"), in the case of a credit institution, or from the Spanish Securities Market Commission ("**CNMV**"), in the case of an investment firm. In order to determine the place where the provision of activities takes place, Spanish regulations on investment services apply the "solicitation test" stating that where a non-EEA firm provides investment services at the exclusive initiative of the customer, the services will not be deemed to be provided in Spain. Conversely, if the investment services are not provided at the exclusive initiative of the client, they will be considered provided in Spain.

14. Royal decree-law 5/2019, of 1 March, taking contingency measures vis-a-vis the withdrawal of the UK from the EU without an agreement under article 50 of the European Union Treaty having been reached.

15. It is possible that the Spanish government may enact a new Royal Decree-law providing for certain contingency measures in the event that an agreement regulating the relationship between the UK and the EU is not entered into before the end of the transitory period. The terms of this new Royal Decree-law would probably not differ too much from the 2019 piece of legislation.

Although "solicitation" is not defined it is generally interpreted to occur where there is any selling or marketing effort addressed to Spanish residents in respect of products or services. Therefore, a licence is required whenever an entity from outside Spain approaches Spanish residents (either natural persons or corporates incorporated/domiciled in Spain) to sell or market its products or to canvas clients. In certain cases Spanish regulators would not only apply the solicitation test but may consider that services are been provided in Spain in other circumstances. Amongst others, this would be the case if the entity intends to place securities to Spanish residents based on a mandate of its foreign client. Likewise, this would be the case if an entity maintains a permanent physical presence in Spain even though neither a branch nor a subsidiary is formally created.

While general exemptions under MIFID would apply to UK firms, no other specific exemption for foreign firms is established in Spain apart from reverse solicitation as indicated above.

Investment services can only be provided on a cross-border basis into Spain to eligible counterparties and per se professional clients after such non-EEA investment firms obtain a cross-border license, given that services provided to retail or elective professional clients (i.e. those that request to be treated as professionals) must be provided mandatorily via a branch. Moreover, it is important to know that Spanish law implementing MiFID II allows the CNMV to require non-EEA entities to open a branch in Spain (not allowing them to act on a cross-border basis) even though they target only eligible counterparties or per se professional clients. To reach such decision, the CNMV shall consider the volume of the activity, the complexity of the products and services provided and reasons of general interest. In a communication related to Brexit, the CNMV stated that in its view the normal scenario will be that establishing a branch would be required.

Regulated markets, MTFs or OTFs

With regard to access to Spanish trading venues by remote third-country members, the CNMV stated in its Q&A in relation to the UK withdrawal[16] that "UK firms shall not be required to request a new authorisation to execute client orders or to deal on their own account to continue being participants of the Spanish securities market, as this circumstance was already included in the authorisation initially submitted". This position has been confirmed recently by the CNMV.

Since Spanish law does not restrict Spanish entities from being members of third-country markets, the CNMV has also confirmed that despite the fact that operation of an MTF or an OTF is an investment service under MIFID, no passport for EU operators of MTF or OTFs or an authorization for non-EU operators of MTFs or OTFs to offer Spanish entities access to them is required because this would indirectly entail restrictions for Spanish entities being able to participate in such MTFs or OTFs.

UK managers and UK funds

As of 1 January 2021, unless a special transitional regime is set out, UK management companies that are carrying out collective portfolio management activities or providing any other investment services permitted under current Spanish regulations will be subject to the regime established for third-country entities and therefore will require prior authorisation from the CNMV to continue providing such services.

Besides this, unless a special transitional regime is set out, as of 1 January 2021, the CNMV will not process any requests for passporting received from the UK, and any such requests will be subject to the third-country regime. Therefore, as of such date, UCITS domiciled in the UK or Gibraltar and AIFs domiciled in or with management companies in the UK or Gibraltar which have been distributed in Spain in accordance with a passport (**UK Funds**), will be subject to ex officio de-registration by the CNMV unless they

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have previously regularised their situation (by requesting authorisation for the marketing thereof in accordance with the provisions for third countries or by merging with EU firms).

Meanwhile, those Spanish investors who kept their investments in the UK Funds on that date would not be able to benefit from the tax-roll over regime that applies to UCITS (which they should be specifically alerted of). Besides that, the CNMV understands that if, post-Brexit, Spanish investors remain in the UK Funds, they should continue to receive relevant fund information. If they are notified through a website, they would have to be informed that the UK Fund can no longer be marketed and distributed in Spain. The distribution agreements could be renegotiated in order to ensure their compliance and, in any event, prevent any further distribution of the UK Funds. Lastly, once the UK Funds are no longer distributed and have been removed from the CNMV's registry, the obligation to pay fees to the CNMV will end.

Credit institutions

Spanish banking regulations are silent on the point of when activities are considered to be carried out in Spain. However, since for banks providing investment services into Spain, solicitation test will apply, we believe that, for consistency reasons, the BoS will apply a similar "solicitation test" for banks carrying out banking activities in Spain. For these purposes, with the term banking activities, we refer also to payment services and issuance of electronic money.

Credit institutions cannot provide regulated or non-regulated services in Spain at all without triggering licensing requirements except in the case of reverse solicitation. Therefore, UK credit institutions wishing to continue operating in Spain further to the end of the transitory period would need either a cross-border license or a license for establishing a branch.

As previously mentioned in relation to investment services firms, investment services can only be provided on a cross-border basis into Spain to eligible counterparties and per se professional clients given that services provided to retail or elective professional clients (i.e. those that request to be treated as professionals) must be provided mandatorily via a branch. As to investment services provided to eligible counterparties and per se professional clients, as mentioned, the CNMV has taken the view that, for reasons of general good, investment services require the establishment of a branch in most cases. The BoS has confirmed us that they will accept the views that the CNMV will express in its report where a bank request a cross-border license to provide investment services in Spain.

The possibility of providing banking services on a cross-border basis without establishing a branch in Spain will be analysed by the BoS on a case by case basis where a credit entity from a non-EEA state requests a cross-border license. In any event, a draft-bill amending banking law has been published in which it is provided that non-EEA credit institutions would not be authorized to taking refundable funds from public unless they establish a branch in Spain.

Payment institutions and electronic-money issuers

Spanish law does not contemplate the granting of an authorization for third country payment institutions or electronic-money issuers providing cross-border services into Spain or opening a branch or establishing a network of agents in Spain. Therefore any of these UK institutions would be obliged by law to cease operations in Spain by the end of the transition period.

Insurers

At the end of the transition period, absent of any new regime which could be eventually agreed by the EU and the UK whether on a transitory or a permanent basis, it is arguable that any UK insurance company that intends to continue operating in Spain would need either (i) to establish a third-country branch in Spain; or (ii) establish a subsidiary in Spain; or (iii) establish a subsidiary in a EU-27 country which would be able to continue providing services into Spain on a cross-border basis.

Likewise, it would not be allowed for a UK insurer to underwrite any Spanish risks directly or through any intermediaries (e.g. Spanish agents or brokers) unless said UK insurer has established a third-country branch in Spain as referred in item (i) above.

Reinsurers established in a third country would continue to be able to provide reinsurance services from the third country on a cross-border basis. In addition, those reinsurers could (but do not need to) also (i) establish a third-country branch in Spain; or (ii) establish a subsidiary in Spain; or (iii) establish a subsidiary in a EU-27 country.

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